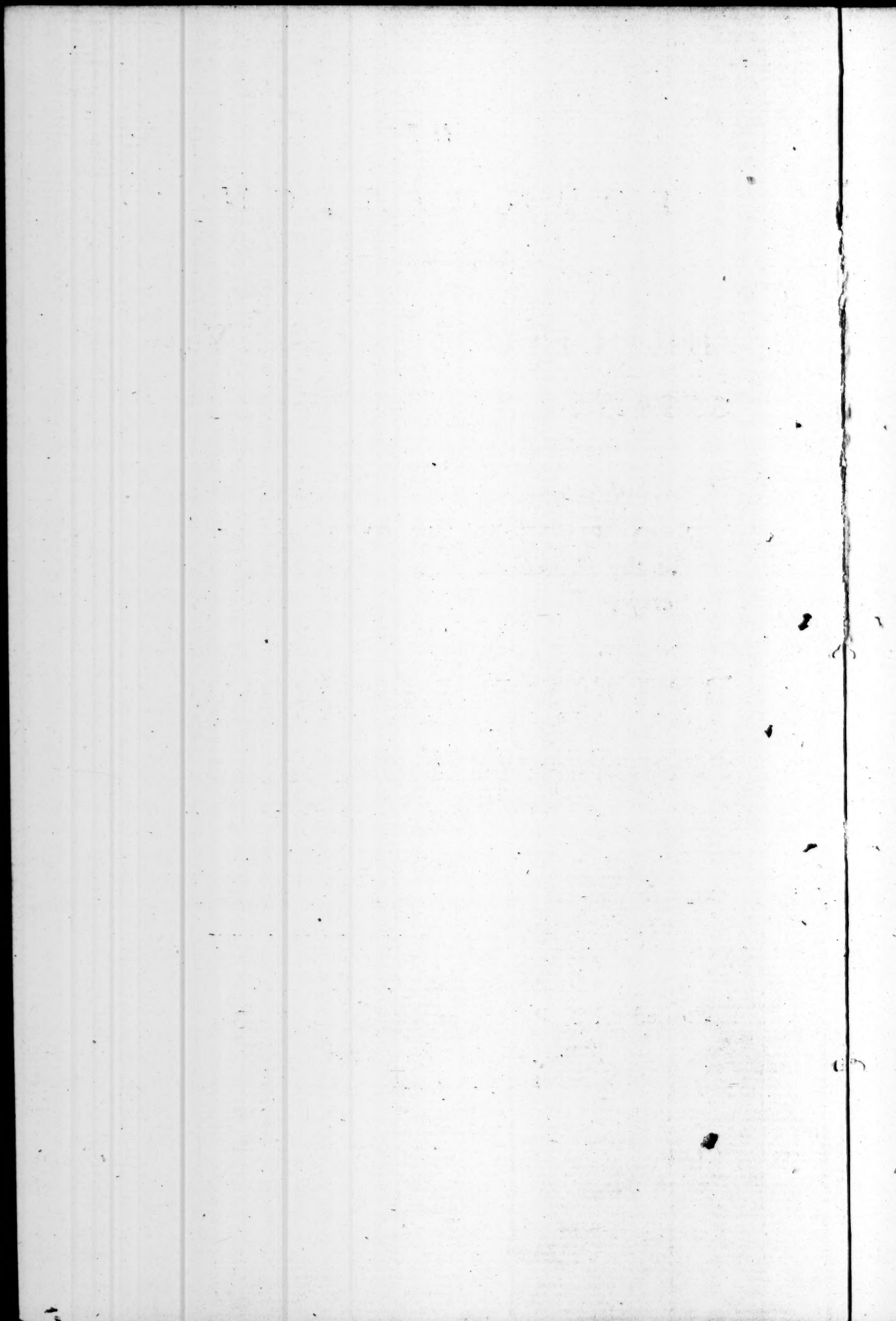




THE
F O U N D A T I O N
O F
BRITISH LIBERTY.





THE
FOUNDATION
OF
BRITISH LIBERTY;

PROVING

The indisputable Right of every ENGLISH-
MAN to the Common Laws of the Land,
for the Protection of his Person and Pro-
perty :

IN

A LETTER from a Gentleman in the Country
to his Friend in LONDON.



L O N D O N :

Printed for T. PEAT, at N^o 22, near St. Dun-
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MDCCLXVIII.

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THE
FOUNDATION
OF
BRITISH LIBERTY, &c.

SINCE your last letter concerning the interruption of the tranquillity of his Majesty's subjects, I have seen a little piece, printed a few years since, which has enabled me to lay before you the invaluable privileges of Englishmen, so far as they relate to the subject on which you wrote.

THE

THE author of the piece I speak of seems to be a gentleman of great ability, and one who is thoroughly acquainted with our laws; placing him therefore before me, I shall proceed to inform you,

THAT we have many extensive laws in support of our liberty and property, whereby not only the common and lower class of the people are bound, but every degree and order in the state; and no man's liberty is any farther restrained than the welfare and preservation of the whole community requires; so that the persons and properties of every subject shall be free from any wrongful or illegal encroachment,

It

It is, and has been, the common law of this land, for many centuries, that no freeman* shall be deprived of his life, liberty, or property, but by the law of the land, that is, by due process of law, founded on such laws as are or shall be made in restraint of the liberty of every individual, for the general peace and safety of the whole community, or by the judgement of twelve men (his equals), legally impanelled and sworn to deliver a truth upon such evidence as shall be delivered them touching the matter in question.

So tenderly should the person of the subject be treated in matters of public

* Every subject is a freeman.

offence,

offence, in every criminal case, without exception, that every man suspected of a crime shall have an opportunity, by giving security for his appearance to abide the sentence of the law, of retaining his liberty till after conviction *.

THE Great Charter, made by king, Henry the Third in the ninth year of his reign, confirmed by king Edward the first in the twenty-eighth year of his reign, and many times since ratified and enforced by acts of parliament, has, ever since its passing, been considered as the fundamental plan of English liberty; so that it may be said,

* Glanvil. lib. xiii. cap. 1.

that

that whatever was before the passing of that charter, or now is, the common law of the land, is either founded on, or declared by, this charter. I will here insert the twenty ninth article of it, which is the most material one: “ *No Freeman shall be taken, or*
 “ *imprisoned, or be disseised of his*
 “ *freehold, or liberties, or free customs,*
 “ *or be outlawed, or exiled, or any*
 “ *otherwise destroyed; nor we will not*
 “ *pass upon him, or condemn him, but*
 “ *by lawful judgement of his peers*
 “ *[or equals], or by the law of the*
 “ *land; we will sell to no man, we will*
 “ *not deny or defer to any man, either*
 “ *justice or right.*”

B

THIS

THIS is a declaration of the liberties, which, by the common law of the land, every subject of the English government is entitled to the full enjoyment of.

IMPRISONMENT is always warranted by the law, as a security for the supposed offender's appearance to answer the charge against him, which is to take place only in consequence of legal process, legally issued, and by virtue of a legal warrant thereon under the hand of some public officer, authorised by the law of the land to grant such warrant; which warrant is to set forth the cause or ground of the commitment; but whenever the
party

party accused can procure security for his forth-coming to justice, he is entitled to be freed from his confinement; the gaol being his security only who can procure no other. Imprisonment is legal when inflicted as a punishment for an offence against the public, of which the party is to be legally convicted by the judgement of his peers, the sentence being pronounced by a court having jurisdiction in the cause, and authority to pass such sentence; so that every man is free, and hath a right so to remain, unless accused of some offence; nay, even then, until his guilt be proved, and sentence passed on him (which cannot legally pass but by the judgement of his peers), he

hath an opportunity to continue free,
upon finding security for his appear-
ance.

No man ought to be imprisoned but
for some certain cause which is a legal
ground of imprisonment; and if any
man, by colour of authority, where he
hath not any in that particular case,
arrest or imprison another, though there
might be good cause of imprisonment,
yet such imprisonment is illegal, an
infringement of the subject's liberty,
and a breach of the law of the land*.

EVERY free subject is entitled, as a
member of the community, to the

* Institutes, 52, 53, and 54.

enjoy-

enjoyment of liberty, subject to a condition of exception, of his own creating, as the doing some act which by the law of the land limited or took away his general right.

IN all well-regulated states, there is a power lodged with some part of the state to redress grievances. In England, that power is legally vested in the king, who administers justice by his judges; and I hope that our judges will always prove themselves men of the utmost integrity, and who have the greatest regard to the subject's liberties. To them therefore must the party aggrieved in his right apply, and
from

from them he is intitled to have redress, and to have it immediately, and without hearing, if there were no law to restrain and limit the general right in particular cases. But as the title is not so general as to be without exception, there must be supposed to be some method of bringing the matter before those who have power to determine whether it was a case excepted out of the general law or not; and as this can only be done by legal process or writ, it follows that such writ must necessarily result from, and be coeval with, the grant of the right. As this writ is to enforce a common and general right, and as it is a process issued

issued only to bring the parties, and the matter in question, before the proper judicature, where, on the hearing, the determination is afterwards to be made, the party imprisoned or deprived of liberty must be supposed to have a right intitled to such process, which is therefore called a writ of right, and is to be issued from the king's courts.

It appears, by the common law of the land, that every freeman who is deprived of his liberty has a right to have a writ of Habeas Corpus, for the bringing up his body, with the cause of his detainer, before the King

as

as administering justice by his judges ;
 and the end of that writ is, that the
 person imprisoned might undergo and
 receive whatever the court should
 then and there order according to
 law ; which is thus explained by Lord
 Coke : “ If it appeareth that his im-
 “ prisonment was lawful and just, he
 “ shall be remanded ; but, if it shall
 “ appear that he was imprisoned
 “ against the law of the land, they
 “ ought, by force of the Great Char-
 “ ter, to deliver him : if it be doubt-
 “ ful, and under consideration, he
 “ may be bailed *.”

* 2 Institutes, 55.

THIS writ has always been a writ of right*; for if the power of granting it was discretionary, the court could determine before they had heard. The statute 36 Edward III. says, "If any man that feeleth himself grieved, contrary to the articles above-written, or otherwise contained in divers statutes (among which Magna Charta is mentioned) will come into the chancery, or any for him, and thereof make his complaint, he shall presently there have remedy, by force of the said statutes." And in the statute of Marlbridge, 52 H. III. it is

* 2 Institutes, 54.

C

enacted,

enacted, " That all writs shall be
" freely granted."

AT a conference of a committee
from both Houses of Parliament con-
cerning the famous Petition of Right,
it was resolved, " That the writ of
" Habeas Corpus may not be denied,
" but ought to be granted to every
" man that is committed or detained
" in prison, or otherwise restrained,
" though it be by the command of
" the King, the privy council, or any
" other, he praying the same."

THE Petition of Right set forth,
" That divers of his Majesty's sub-
" jects

“ jects had of late been imprifoned,
 “ without any caufe fhewn, againft
 “ the tenour of the Great Charter,
 “ and other good laws and ftatutes
 “ of the realm ; and when for their
 “ deliverance they were brought be-
 “ fore his Majefty’s juftices, by his
 “ Majefty’s writ of Habeas Corpus,
 “ there to undergo and receive as
 “ the court fhould order, and their
 “ keepers commanded to certify the
 “ caufes of their detainer, no caufe
 “ was certified, but that they were
 “ detained by his Majefty’s fpecial
 “ command, fignified by the Lords
 “ of his privy council, and yet were
 “ returned back to their feveral pri-
 C 2 “ fons,

“ sons, without being charged with
 “ any thing by which they might
 “ make answer according to the law ;
 “ it was prayed, and by his Ma-
 “ jesty’s assent to that prayer pro-
 “ vided and enacted, That no free-
 “ man be in any such manner as is
 “ before-mentioned imprisoned or de-
 “ tained *.”

THOUGH those liberties were often
 infringed, both in the reigns of
 Charles the First and Second, it does
 not appear that the judges of the
 King’s courts ever refused the writ of
 Habeas Corpus to any one imprisoned
 by any authority whatever.

* Statutes at large, 3 Charles I.

IN the thirty-first year of the reign of Charles the Second, the Parliament found it necessary, to prevent some arbitrary designs, to pass that statute intituled, An act for the better securing the liberty of the subject; which has been always esteemed the great bulwark of English Liberty: whereby, after reciting, * “ That
 “ great delays had been used, by she-
 “ riffs, gaolers, and other officers, to
 “ whose custody any of the King’s
 “ subjects had been committed for
 “ criminal or supposed criminal mat-
 “ ters, in making returns of writs of
 “ Habeas Corpus, to them directed,

* Statutes at large, 31 Charles II. c. ii.

“ by

“ by standing out an *alias* & *plures*,
 “ and sometimes more, and by other
 “ shifts, &c. contrary to their duty,
 “ and the known laws of the land,
 “ whereby many of the King’s sub-
 “ jects had been, and hereafter might
 “ be, long detained in prison; for
 “ the prevention thereof, and for the
 “ more speedy relief of all persons
 “ imprisoned for any such criminal
 “ or supposed criminal matters, it
 “ was enacted, That whensoever any
 “ person or persons should bring any
 “ Habeas Corpus, directed unto any
 “ sheriff, gaoler, minister, or other
 “ person whatsoever, for any person
 “ in his or their custody; and the
 “ said

“ said writ should be served on such
 “ officer, or left at the gaol, such officer,
 “ &c. should, under the penalty of
 “ one hundred pounds for the first
 “ offence, and two hundred pounds
 “ and incapacity to hold his office
 “ for the second, within three days
 “ after service thereof, unless the
 “ commitment were for treason or
 “ felony plainly and specially ex-
 “ pressed in the warrant of commit-
 “ ment, upon payment or tender of
 “ the charges of bringing the pri-
 “ soner up, to be ascertained by the
 “ judge or court who awarded the
 “ writ, and security given for the
 “ party’s going back, and not escap-
 “ ing (if remanded), make return of
 “ such

“ such writ, and bring the body of
 “ the party so committed or restrained
 “ before the lord chancellor &c. or
 “ such other person before whom
 “ the said writ was made returnable,
 “ according to the command there-
 “ of, and likewise then certify the
 “ true causes of his detainer and im-
 “ prisonment, unless the place of con-
 “ finement were above twenty miles
 “ distant from such court &c.; but,
 “ if above twenty miles, and within
 “ one hundred, then within ten days;
 “ and, if above one hundred miles,
 “ then within twenty days, and not
 “ longer. And that if any person so
 “ standing committed or detained in

“ vacation time, other than persons
 “ convict or in execution, or any one on
 “ his behalf, complained to the lord
 “ chancellor, or lord keeper, or any
 “ one of his Majesty’s justices, either
 “ of the one bench or of the other,
 “ or the barons of the exchequer of
 “ the degree of the coif, the said lord
 “ chancellor, &c. or any of them,
 “ upon view of the copy of the war-
 “ rant of commitment or detainer,
 “ or otherwise upon oath made that
 “ such copy was denied to be given
 “ by the person in whose custody the
 “ prisoner was detained, were autho-
 “ thorised and required, under the pe-
 “ nalty of five hundred pounds, upon

D

“ request

“ request made in writing by such
 “ person, or any on his behalf, at-
 “ tested and subscribed by two wit-
 “ nesses, who were present at the de-
 “ livery of the same, to award an Ha-
 “ beas Corpus, under the seal of such
 “ court whereof he should then be
 “ one of the judges, to be directed
 “ to the officer, &c. in whose custo-
 “ dy the party should be, returnable
 “ immediately before the lord chan-
 “ cellor or such justice, &c. to be
 “ returned as aforesaid within the
 “ times abovementioned ; and the
 “ chancellor, or such justice, &c. be-
 “ fore whom the said party was
 “ brought, should discharge him from
 “ his

“ his imprisonment, taking his re-
 “ cognizance with one or more su-
 “ reties in any sum, according to
 “ their discretions, having regard to
 “ the quality of the prisoner and na-
 “ ture of the offence, for his appear-
 “ ance in the court of king’s bench
 “ the term following, or at the next
 “ assizes, &c. or in such other court
 “ where the offence should be pro-
 “ perly cognizable, as the case should
 “ require, unless it should appear un-
 “ to the said lord chancellor, &c. that
 “ the party so committed was de-
 “ tained upon a legal process, order,
 “ or warrant, out of some court hav-
 “ ing jurisdiction of criminal matters,

“ or by some warrant signed and
 “ sealed with the hand and seal of
 “ any of the said justices or barons,
 “ or some justice of the peace, for
 “ such matters or offences for which
 “ by law the prisoner was not bail-
 “ able.”

THIS act must be considered as a
 confirmation of the liberty of the sub-
 ject, and ought to be construed liberal-
 ly, and as far as either the intent ap-
 pears, or the words will by any means
 bear such construction, so as to make
 it, if possible, coextensive with the
 wants of the subject: and though it
 does not extend the subject's common

law right to the writ of Habeas Corpus, it is calculated to give a more speedy relief.

It sufficiently appears, from what has been said, that by the common law of this land, confirmed by various acts of parliament, every subject restrained or deprived of personal liberty has a right to have freely and without denial a writ of Habeas Corpus, to be issued out of, and returnable in, the court of king's bench in term time, and out of the chancery in vacation, for bringing him, with a certificate of the cause of his detainer, into either of the said courts; where if it appear that
he

he was wrongfully committed or confined, or by one that had not jurisdiction, or for a cause for which a man ought not to be imprisoned, he may and ought, by such court, to be discharged from his imprisonment, or if legally committed for a bailable offence, be bailed, or if for an offence not bailable by law, be remanded.

I AM persuaded you are by this time convinced that an Englishman's rights and liberties are inestimable, and that they are established on the most solid and sure foundation. That our judges may justly and firmly support those rights and liberties, and the nation be
pre-

preserved from intestine broils, and
 that our children may receive our liber-
 ties in the same state as we and our
 ancestors have enjoyed them, is the
 ardent prayer of

Your friend and

humble servant,

W. P.

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 and liberties are inalienable, and that
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F I N I S.
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